In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1678

STATE OF CALIFORNIA, *ex rel.* C. B. CHRISTENSEN, DIRECTOR OF FOOD AND AGRICULTURE, ET AL.,
Petitioners,

vs.

FEDERAL TRADE COMMISSION, ET AL.,
Respondents.

Petition of State of California for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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OPINIONS BELOW

The decision of the U.S. Court of Appeals for the Ninth Circuit is appended hereto as Appendix 1.

JURISDICTION

The decision of the U.S. Court of Appeals was rendered on March 3, 1977. A petition for writ of certiorari is due on or before June 1, 1977. *American Railway Express Co. v. Levee,* 263 U.S. 19 (1923). This Court has jurisdiction under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Are State officials and agencies subject to the Federal Trade Commission Act, 15 U.S.C. §§ 41-77, to the extent that said officials and agencies must exhaust their administrative remedies before the Federal Trade Commission prior to asserting before a federal court that they are not subject to the jurisdiction of the Federal Trade Commission?

FEDERAL LAWS INVOLVED

This case involves an interpretation of sections 5 and 12 of the Federal Trade Commission Act, 15 U.S.C. §§ 45, 52, set forth in Appendices 2 and 3, respectively.

STATEMENT OF THE CASE

This petition raises the fundamental question whether California's Director of Food and Agriculture (the "Director"), and an advisory board created under State law to assist the Director, are subject to the Federal Trade Commission Act (the "FTC Act"), 15 U.S.C. §§ 41-77, to the extent that they must exhaust their administrative remedies before the Federal Trade Commission (the "FTC") prior to asserting before a federal court that they are not subject to the jurisdiction of the FTC. In *Parker v. Brown*, 317 U.S. 341 (1943), this Court held that a California advisory board, virtually identical to the advisory board involved here, is immune from substantive liability under the federal antitrust laws, since Congress presumptively does not intend to limit the trade practices of the sovereign States in the absence of a clear expression of its intent. The question here is whether Congress, in the absence of a clear expression of its intent, presumptively intends to subject the States to the administrative procedures of the

antitrust laws. Phrased differently, the question is whether the principles of federalism that underlie the States' *substantive* immunity from the antitrust laws also warrant their *procedural* immunity. The case is thus vitally important in determining the exact limits and nature of the States' immunity from the antitrust laws, a question that has proven of increasing interest to this court. See *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975); *Cantor v. Detroit Edison Co.*, ... U.S. ....., 44 U.S.LW. 5357 (1976).

The California Marketing Act of 1937 (the "marketing act") authorizes the Director to issue a marketing order that regulates the production and marketing of specific agricultural products. Cal. Food & Ag. Code §§ 58601-59293. Such an order can be issued by the Director if, after conducting a public hearing, he concludes that the order will further the purposes of the marketing act. The marketing act also provides for the creation of an advisory board "to assist the Director in the administration of" the marketing order. *Id.* at § 58841. The members of the advisory board are appointed by, and serve at the pleasure of, the Director. *Ibid.* All acts of the advisory board are "subject to the approval of the Director." *Id.* at § 58846. The Director has issued a series of regulations and policy letters governing the operations of his advisory boards.

Pursuant to the provisions of the marketing act, the Director issued a marketing order for milk products that resulted in the creation of the Milk Producers Advisory Board (the "advisory board"). The primary purpose of the marketing order is to provide for an advertising program to promote the sale of milk products. The advisory board, with the Director's approval, then entered into an agreement with a professional advertising company, Cunningham and Walsh ("C & W"), under which C & W agreed

to act as the advisory board's agent in conducting the advertising program. The program featured, *inter alia,* the use of the slogan, "Milk has Something for Every Body." The Director approves, and on occasions rejects, the advertising copy submitted by C & W.[1]

The FTC objected to the advertising program, on grounds that it allegedly utilized false advertising in violation of sections 5 and 12 of the FTC Act, 15 U.S.C. §§ 45, 52. After strenuous negotiations, the Director, although denying that the program utilizes false advertising, discontinued the objectionable features of the program. The FTC subsequently filed an administrative complaint against the advisory board and C & W, seeking a cease-and-desist order for their alleged violations of the FTC Act. The administrative complaint does not, however, name the Director as a party to the administrative action. The Director, joined by the advisory board and C & W, then filed this action in the federal district court, seeking to enjoin the FTC from proceeding with its administrative complaint.

The complaint filed in the federal court alleges that the plaintiffs are not within the scope of the federal antitrust laws, including the FTC Act, under this Court's decision in *Parker v. Brown,* 317 U.S. 341 (1943). The FTC, in its answer, alleges that the plaintiffs are subject to the federal antitrust laws. Both sides submitted motions for summary judgment, supported by extensive affidavits and exhibits.

The federal district court granted the plaintiffs' motion

1. The above facts are supported by affidavits and exhibits in support of the plaintiffs' motion for summary judgment, and are uncontradicted.

for summary judgment, and denied that of the defendants.[2] The court ruled that (1) the FTC Act is not applicable to the plaintiffs, and (2) the plaintiffs are not required to exhaust their administrative remedies by first raising their jurisdictional argument in the administrative proceeding before the FTC. The defendants appealed. The Ninth Circuit, without reaching the merits of the jurisdictional question, ruled that the plaintiffs are required to exhaust their administrative remedies before the FTC. It reversed and remanded the decision of the district court. App. 1, pp. 1-7.

ARGUMENT

The Ninth Circuit held that the plaintiffs must exhaust their administrative remedies by initially presenting their jurisdictional defense, based on *Parker v. Brown,* 317 U.S. 341 (1943), before the FTC. Normally, a ruling that a party must exhaust his administrative remedies would not merit the attention of this Court; such a ruling does not touch the merits of the controversy, and this Court has the option of considering those merits after final judgment. However, the Ninth Circuit's ruling raises a fundamental question of federal law, one that cannot be reviewed later in this proceeding. Its ruling requires State officials to participate in administrative proceedings before the FTC, to determine whether those officials are in violation of the federal antitrust laws. As we read this Court's decision in the *Parker* case, as amplified in *Cantor v. Detroit Edison Co.,* ..... U.S. ....., 44 U.S.L.W. 5357 (1976), the principles of federalism that underlie the States' immunity from the antitrust laws equally underlie their immunity from the administrative procedures contained in those laws. Moreover, this fundamental question cannot be addressed later in this case; if

2. The Judgment, and the Findings of Fact and Conclusions of Law, of the district court are attached hereto as Appendix 4.

the Ninth Circuit's ruling is not immediately reversed, the plaintiffs will be compelled to participate in the administrative proceedings before the FTC, thus rendering moot their argument that they are immune from such proceedings.

1. Cantor's Distinction Between State and Non-State Agencies.

In *Parker,* this Court held that the Sherman Act is not applicable to actions of the States or their agencies. It is not without significance that *Parker* involved the actions of a California advisory board virtually identical to the California advisory board involved here, and that the advisory boards in the two cases were created under virtually identical statutory authority. Thus, any suggestion that the advisory board in this case is not an agency of the State of California, for purposes of the *Parker* doctrine, must fail by reference to the *Parker* case itself.

The FTC, in its brief to the Ninth Circuit, did not argue that the Director or the advisory board are not agencies of the State of California. Rather, relying on this Court's decision in *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975), the FTC argued that the applicability of the *Parker* doctrine depends not on the *identity* of the party, but rather on the *nature of his activity.*[3] The Ninth Circuit evidently agreed, for, citing this Court's decisions in *Goldfarb* and *Cantor,* it is stated that "a full factual development is an essential prerequisite for determining the Parker v. Brown issue." App. 1, p. 7. As shall be seen, pp. 13-14, *infra,* this prerequisite has already been satisfied, since both parties submitted extensive affidavits and exhibits on the jurisdictional issue in support of their respective motions for summary judgment; it is thus doubtful that any additional evidence can be offered to the FTC that is not already in the record on appeal. That question aside, it is apparent that the Ninth Circuit has misread this Court's recent decision in the *Cantor* case.

3. The FTC also argued that, in any event, the *Parker* doctrine is not applicable to proceedings under the FTC Act, a question which is one of first impression.

In *Cantor,* this Court set up two classifications for determining the applicability of the *Parker* rule: (1) actions by States and their agencies, and (2) actions by private individuals acting pursuant to State law. The Court stated:

> "In *Parker v. Brown,* . . . the Court held that the Sherman Act was not violated by state action displacing competition in the marketing of raisins. In this case we must decide whether the *Parker* rationale immunizes private action which has been approved by a State and which must be continued while the state approval remains effective.
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> . . .
>
> "Unquestionably the term 'state action' may be used broadly to encompass individual action supported to some extent by state law or custom. Such a broad use of the term, which is familiar in civil rights litigation, is not, however, what Chief Justice Stone described in his *Parker* opinion. He carefully selected language which plainly limited the Court's holding to official action taken by state officials.
>
> . . .
>
> "In this case, unlike *Parker,* the only defendant is a private utility. No public officials or agencies are named as parties and there is no claim that any state action violated the antitrust laws. Conversely, in *Parker* there was no claim that any private citizen or company had violated the law. The only Sherman Act issue decided was whether the sovereign State itself, which had been held to be a person within the meaning of § 7 of the statute, was also subject to its prohibitions. Since the case now before us does not call into question the legality of any act of the State of Michigan or any of

its officials or agents, it is not controlled by the *Parker* decision." 44 U.S.L.W. at 5358, 5360, 5361.

With respect to actions by private individuals acting pursuant to State law, the Court stated, the *Parker* rule is applicable only if (1) the private entity has "sufficient freedom of choice" to comply with the federal antitrust laws, notwithstanding the State regulatory scheme, and (2) the State law under challenge is not fundamental to the overall State regulatory scheme. *Id.* at 5361-5363. Thus, the Court indicated that the nature of the challenged conduct is relevant *only* if the conduct is that of a private entity, not that of a State or its agencies. This conclusion is buttressed by the concurring opinion of the Chief Justice in *Cantor,* who wrote that the majority opinion, instead of focusing on the "challenged *activity*" as in *Goldfarb,* focused instead on the "identity of the *parties.*" *Id.* at 5364. (Emphasis in the original.)

If our interpretation of *Cantor* is correct, then the Ninth Circuit's decision is fundamentally wrong. Its decision can accomplish no more than, at most, allowing further light to be shed on the nature of the activities of the Director and the advisory board. As shall be seen, pp. 13-14, *infra,* it is doubtful if the Ninth Circuit's decision can even accomplish that limited objective. That question aside, the further inquiry demanded by the Ninth Circuit is, under *Cantor,* relevant only with respect to activities of private parties acting under the State's direction, not with respect to activities of the State itself. Here, the Director and the advisory board are agencies of the State of California, and the FTC did not contend otherwise in its brief to the Ninth Circuit. Both are created under California law, to pursue objectives spelled out in California law. Indeed, this is virtually the same advisory board as that which was held

immune from antitrust liability in the *Parker* case. Thus, the further inquiry mandated by the Ninth Circuit is, under *Cantor,* irrelevant.

2. Impairment of Principles of Federalism.

Underlying the *Parker* rule is the view that, under our federal system of government, the States should not be deemed subject to trade restraints imposed by Congress unless Congress clearly says so. *Parker v. Brown,* 317 U.S. 341, 350-351 (1943). The same principles of federalism, in our view, sustain the States' immunity from the administrative procedures contained in one of the antitrust laws, the FTC Act. The States are sovereign components of our federal system of government, consisting of legislative, executive and judicial branches of government. This Court has recently given renewed emphasis to the sovereignty of the States under our federal system, by holding the States immune from certain federal laws applicable to private entities. *National League of Cities v. Usery,* 426 U.S. 833 (1976); *Employees v. Department of Public Health & Welfare,* 411 U.S. 279 (1973); *Edelman v. Jordan,* 415 U.S. 651 (1974). As the Court declared in *Parker,* "an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." 317 U.S. at 351. As Congress presumptively did not mean to expose the States to substantive liability under the antitrust laws, it presumptively did not mean to subject them to administrative remedies or procedures under those laws.

The Ninth Circuit's decision is utterly oblivious to the principles of federalism that underlie the *Parker* doctrine. After spelling out the criteria of the exhaustion rule, the court applied that criteria to the plaintiffs in the same way that the criteria would be applied to a private party claim-

ing one of the many exemptions found in the antitrust laws.[4] No recognition was given to the fact that the jurisdictional argument in this case was raised by the sovereign State of California, not by a private party. Thus, the jurisdictional argument of California, which is grounded in the historic federalism of our constitutional system of government, fared no better than the argument of a private party who might be engaging in a specific act that Congress intended to be beyond the pale of the antitrust laws. In fact, as a precedent for its decision, the Ninth Circuit cited two federal appellate decisions holding that *private* parties who assert the benefit of the *Parker* rule, much as Detroit Edison asserted the benefit of that rule in the *Cantor* case, must first exhaust their administrative remedies.[5] It cited other decisions where this Court held that private parties, before asserting jurisdictional objections to *other* federal laws, must also exhaust their administrative remedies.[6] Other courts have noted, however, that *Parker* compels the conclusion that the antitrust laws were not even intended to be extended to the States, not that the States are exempt from such laws in the sense that private parties are exempt if they engage in certain kinds of conduct not covered by those laws. *New Mexico v. American Petrofina, Inc.*, 501 F.2d 363, 371 n. 18 (9th Cir. 1974); *E. W. Wiggins Airway, Inc. v. Massachusetts Port Authority*, 362 F.2d 52, 56 (1st Cir.

4. The criteria, spelled out by the Ninth Circuit involved the extent of injury from pursuit of the administrative remedy, the degree of apparent clarity or doubt about administrative jurisdiction and the involvement of specialized administrative understanding in the question of jurisdiction. App. 1, p. 3.

5. See *FTC v. Markin*, 532 F.2d 541 (6th Cir. 1976); *FTC v. Feldman*, 532 F.2d 1092 (7th Cir. 1976); App. 1, pp. 5-6.

6. See *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972); *Leedom v. Kyne*, 358 U.S. 184 (1958); App. 1, pp. 4-5.

1966). Thus, the *Parker* rationale immunizes the States from the administrative procedures of the FTC Act, just as it immunizes them from substantive liability under the antitrust laws themselves. It follows that the States and their agencies can present their jurisdictional challenge to the FTC in a federal district court, without being required to first present this challenge in an administrative proceeding conducted by the FTC.

3. Impairment of State Interests.

The impairment of California's sovereign interests, as a result of the Ninth Circuit's decision, is real and substantial. The entire purpose of California's marketing act is to promote the sale of agricultural products; its purpose is to "[maintain] present markets," "[develop] new or larger markets," "eliminate or reduce economic waste in the marketing of such products" and "restore and maintain adequate purchasing power" for producers. Cal. Food & Ag. Code § 58654. This objective is to be accomplished by "promotional programs," including "advertising and sales promotion." *Id.* at 58889. Pursuant to this act, a marketing order was issued for the purpose of promoting the sale of milk products by an advertising program. Thus, the activities of the Director and the advisory board, in implementing this advertising program, are pursuant to a specific legislative mandate. To the extent that the FTC sets up barriers to the effectiveness of this advertising program, such as by requiring California officials to defend its validity in administrative proceedings of the FTC, the FTC impairs the legislative interest which led to the development of the program.

The Director and the advisory board will be required to sustain a heavy financial burden in defending the administrative action before the FTC, a burden that will

limit their ability to carry out the legislative policies of the marketing act.[7] They will be required, beyond presenting their jurisdictional defense to the FTC, to defend against the FTC's charge that their advertising program is false and deceptive. This charge, which involves complicated, technical factual questions concerning the effect of milk on different racial groups, will undoubtably involve a lengthy, costly administrative hearing. However, this charge has nothing to do with the State's jurisdictional defense. The Ninth Circuit dismissed these considerations with the observation that a *private* person cannot overcome the effect of the exhaustion doctrine by showing that he will be required to expend legal fees in the administrative hearing. App. 1, p. 4. However, the interests of the States, under our federal system, are not the same as those of private persons. To the extent that the State must expend monies to defend an administrative action, it limits its ability to perform other governmental activities. This is especially so where, as here, the State has allocated a special fund for the marketing program that is under investigation by the FTC; if that fund is depleted in defending the administrative action, it cannot be utilized to further the purposes of California's marketing act. Thus, the Ninth Circuit's decision requires California to pay a heavy price to assert its jurisdictional defense under *Parker*.

The price which California must pay is exorbitant in these circumstances. First, under *Parker* and *Cantor*, the States are presumptively immune from federal antitrust

7. As noted above, the FTC, apparently to minimize the implications of *Parker*, did not name the Director as a party in its administrative complaint. It is thus questionable whether the Director will be allowed to intervene in the administrative action, even though his authority is ultimately under review. Under these circumstances, the Director may not even have an administrative remedy to exhaust, a point that was ignored by the Ninth Circuit.

liability, and thus should not be penalized under the exhaustion doctrine for asserting that immunity. Under *Parker* and *Cantor*, it is particularly inappropriate to require California to defend against the merits of the FTC's administrative complaint, simply in order to present its jurisdictional defense to the FTC. Second, the question whether the States are immune from federal antitrust liability is purely a question of law, one that is susceptible of judicial resolution. The federal courts are fully equipped to adjudicate this legal question without administrative intervention; they are probably better equipped than the FTC to adjudicate the question, since the FTC has no particular expertise with respect to the scope and limits of the *Parker* rule. Third, no important federal interest is served by requiring the States to exhaust their administrative remedies before the FTC. To the contrary, an important federal interest is served by obtaining a speedy, efficient judicial resolution of the important issue of federalism in this case, and that interest is served by *not* requiring California to participate in a lengthy administrative hearing that will focus only peripherally on the jurisdictional issue. Therefore, the courts should promptly resolve the jurisdictional issue, as did the district court in this case, without requiring that the issue be presented to the FTC. We do not deny the power of Congress to impose on the States the various burdens implicit in the exhaustion doctrine. However, under *Parker* and *Cantor*, Congress should not be presumed to exercise that power unless it clearly says so, and it has not clearly said so.

The burden which the Director and the advisory board will have to sustain is not limited to a financial one. Factual findings rendered by the FTC in an administrative hearing must be upheld by a reviewing court if supported by "sub-

stantial evidence." *E.g., Montgomery Ward Co. v. FTC*, 379 F.2d 666 (7th Cir. 1967); *Pfizer & Co. v. FTC*, 401 F.2d 574 (6th Cir. 1968). The Ninth Circuit's decision thus enables the FTC to make factual findings that may adversely affect the interests of California, and to have these findings adorned with a presumption of correctness. To give a federal agency this advantage over a sovereign State in an adversary proceeding is to invite the very intrusion on State interests that *Parker* sought to prevent.

The ramifications of the Ninth Circuit's decision extend beyond the facts of this case, and beyond the borders of California. Under the decision, *any* agency of the State of California, or any other State, can be required to expend public funds to defend administrative actions brought by the FTC, rather than seeking a prompt judicial resolution of the FTC's jurisdiction over the State agency. Many State agencies in California enforce regulatory schemes that, but for *Parker*, might be violative of the federal antitrust laws, and these agencies might thus be required to defend administrative actions brought by the FTC. For example, 37 advisory boards now function under the provisions of California's marketing act. Other State agencies regulate pricing and competitive practices of other State industries; pricing and competition in the State's liquor industry, for instance, is comprehensively regulated by the State's Department of Alcoholic Beverage Control. In light of the funds which these agencies might be required to collectively expend in administrative actions brought by the FTC, the effect of the Ninth Circuit's decision is potentially enormous.

4. Ineffectiveness of Exhaustion Doctrine Under Facts of Case.

Aside from the question whether State agencies are required to participate in administrative proceedings con-

ducted by the FTC, it makes no sense, from the standpoint of efficient judicial administration, to require the plaintiffs to so participate under the facts of this case. First, the purpose of requiring such participation, according to the Ninth Circuit, is that "the agency should make the initial determination of its own jurisdiction." App. 1, p. 4. However, the FTC has *already* made its determination that the plaintiffs are subject to the FTC act. In fact, that was its main argument in its brief to the Ninth Circuit.[8] There is no reason to require the FTC to be given an administrative opportunity to determine the applicability of the FTC act to the plaintiffs, when the FTC has already made that determination.

Second, the record on appeal is now complete with respect to evidence pertaining to the FTC's jurisdiction over the plaintiffs. Both sides submitted motions for summary judgment in support of their respective positions on the jurisdictional question, and supported their motions with extensive affidavits and exhibits. Thus, the FTC's position on the jurisdictional question has been fully presented to the court, as has the plaintiffs'. Nothing can be gained by requiring the FTC to re-consider this question in light of evidence that is already before the court.

5. No Further Opportunity for Judicial Review.

We are mindful that this Court does not grant petitions for writs of certiorari prior to final judgment, in the

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8. The FTC's main argument before the Ninth Circuit was captioned as follows:

> "At least in the absence of State legislation directing the prohibited activity, the deceptive advertising and unfair and deceptive practices jurisdiction of the Federal Trade Commission extends to advisory boards organized in accordance with State agricultural marketing orders." Brief for Appellants, 19.

absence of unusual circumstances. *E.g., Brotherhood of Locomotive Firemen v. Bangor & Arostook R.R.*, 389 U.S. 327, 328 (1967).[9] Unusual circumstances exist here. Our petition is not directed towards the ultimate question in this case, *i.e.* whether the Director and the advisory board are subject to the FTC Act. Rather, it is directed towards the question whether these parties are required to exhaust their administrative remedies before the FTC. That question cannot be judicially reviewed after those parties have in fact exhausted their administrative remedies, since the question will then be moot. This is the last chance for the plaintiffs to raise this fundamental question, and the last chance for this Court to effectively review that question. To defer consideration of this question is, for practical purposes, to resolve it against the plaintiffs.

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9. This Court has, on several occasions, granted petitions for writs of certiorari in cases where judgments were not yet final. See *e.g., United States v. General Motors Corp.*, 323 U.S. 273, 377 (1945); *Gillespi v. United States Steel Corp.*, 379 U.S. 148, 153 (1964); *Land v. Dollar*, 330 U.S. 731, 734 n. 2 (1947); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 683 n. 3 (1949). In fact, in *Greene v. United States*, 376 U.S. 149, 162-164 (1964), this Court granted a petition for writ of certiorari that effectively relieved the petitioner from the necessity of exhausting his administrative remedies before a federal agency, thus enabling the Court to immediately reach the merits of the controversy.

CONCLUSION

The Ninth Circuit's decision fundamentally misapprehends this Court's recent decision in *Cantor*. It impairs the principles of federalism that underlie *Parker*. It serves no important federal interest. Accordingly, our petition should be granted.

If the Court grants our petition, it can dispose of this controversy in one of two ways. It can reverse the Ninth Circuit's decision, either summarily or after hearing, and remand the case to that court for further consideration of the merits of the jurisdictional question. Or it can proceed to reach the merits of that question itself. Either way, the Ninth Circuit's decision should not be allowed to stand.

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Appendix 1

STATE OF CALIFORNIA ex rel. C. B. CHRISTENSEN, California Milk Producers Advisory Board & Cunningham & Walsh, Inc., Appellees,

v.

FEDERAL TRADE COMMISSION, Louis A. Engman, Paul Rand Dixon, Mayo J. Thompson, M. Elizabeth Hanford and Stephen Nye, and Daniel J. Hanscom, Appellants.

No. 75-3813.

United States Court of Appeals, Ninth Circuit.

March 3, 1977.

OPINION

GOODWIN, Circuit Judge.

The Federal Trade Commission appeals a district court judgment which ordered the FTC to terminate, for lack of jurisdiction, cease-and-desist proceedings challenging the advertising of milk in a manner which the FTC alleged to be deceptive.

The injunction rested on the proposition that the dairy industry's advertising program was not subject to FTC regulation because it was sanctioned by an instrumentality of the state of California. The district court held that *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), immunized the advertising program in substantially the same manner and for substantially the same reasons described by the Supreme Court in holding California raisin marketing practices immune from antitrust liability.

We express no opinion on the ultimate question of immunity under *Parker v. Brown* because we hold that judicial intervention in this case was premature. The appellees have failed to exhaust their administrative remedies. The

district court's judgment must be vacated and the action dismissed.

On August 1, 1974, the FTC issued its complaint against the California Milk Advisory Board[1] and Cunningham & Walsh, Inc., an advertising agency. The complaint alleged that advertisements to the effect that milk was needed by or beneficial to everybody were false and deceptive in light of evidence that many individuals cannot tolerate milk in their diet.

On September 11, 1974, the Board, Cunningham & Walsh, and the State of California on behalf of its Director of Food and Agriculture sued in the district court to enjoin the FTC proceedings. In their complaint the plaintiffs alleged that the FTC had no jurisdiction to proceed against them because the Board is a state agency and Cunningham & Walsh is the Board's agent. The plaintiffs relied on both the Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.*, and the doctrine of *Parker v. Brown, supra.*

The district court granted a temporary restraining order and a preliminary injunction. After a hearing, the district court found that the FTC had no jurisdiction over the activity of the Milk Advisory Board, and that continued enforcement proceedings would irreparably harm the plaintiffs. Accordingly, the court denied the FTC's motion for summary judgment and granted the plaintiff's motion for

1. The California Milk Advisory Board was created pursuant to the California Marketing Act of 1937, Cal.Food & Agr.Code §§ 58601-59293. The Act calls for the issuance of marketing orders by the Director of Food and Agriculture upon approval of the producers and handlers of that commodity which is its subject. Marketing orders can encompass a variety of activities including advertising programs. The Act also provides for an Advisory Board composed of producers of the subject commodity. The operations of the advisory boards are financed by a tax on the producers. The Milk Advisory Board was created by a marketing order for milk issued in 1969, which authorized, among other programs, an advertising campaign.

summary judgment. The court made permanent its preliminary injunction.

[1] A familiar rule of administrative law provides that judicial relief for a supposed or threatened injury does not become available until the prescribed administrative remedy has been exhausted. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 58 S.Ct. 459, 82 L.Ed. 638 (1938). The rule recognizes that agencies are created to apply their statutory authority in the first instance and that considerations of agency expertise and efficiency counsel the courts not to interfere before the agency has acted. There are, however, cases in which agency preference is outweighed by other factors and the doctrine of exhaustion is not applied. *McKart v. United States*, 395 U.S. 185, 89 S.Ct. 1657, 23 L.Ed.2d 194 (1969); *Downen v. Warner*, 481 F.2d 642 (9th Cir. 1973). The plaintiffs argue that this is such a case.

[2] In *Lone Star Cement Corp. v. FTC*, 339 F.2d 505 (9th Cir. 1964), we adopted the standard formulated by Professor Kenneth Culp Davis in Volume 3 of his Administrative Law Treatise, § 20.03, at 69 (1958 ed.), for determining the circumstances in which a party can seek judicial relief from anticipated agency action. 339 F.2d at 510. *Lone Star Cement* established three key factors which should be weighed in considering the propriety of judicial intervention: extent of injury from pursuit of administrative remedy; degree of apparent clarity or doubt about administrative jurisdiction; and involvement of specialized administrative understanding in the question of jurisdiction. 339 F.2d at 510.

The application of the *Lone Star* standard convinces us that no judicial intervention was warranted in this case.

I. EXTENT OF INJURY

[3] Only a clear showing of irreparable injury from anticipated agency action will excuse the exhaustion of administrative remedies and permit judicial intervention in the agency process. *Renegotiation Board v. Bannercraft Clothing Co.*, 415 U.S. 1, 94 S.Ct. 1028, 39 L.Ed.2d 123 (1974); *Petroleum Exploration, Inc. v. Public Service Commission*, 304 U.S. 209, 58 S.Ct. 834, 82 L.Ed. 1294 (1938); *Sears, Roebuck & Co. v. NLRB*, 153 U.S. App.D.C. 380, 473 F.2d 91 (1972).

[4] The injury which the plaintiffs allege they will suffer if the FTC proceedings run their course is the expenditure of funds for legal fees. But litigation expenses, however substantial and nonrecoverable, which are normal incidents of participation in the agency process do not constitute irreparable injury. *Myers v. Bethlehem Shipbuilding Corp., supra; Renegotiation Board v. Bannercraft Co., supra;* L. Jaffe, Judicial Control of Administrative Action 429 (1965). Even if the necessary costs will be paid by the public, litigation expense remains immaterial.[2]

No other injury which the FTC proceedings could inflict upon the plaintiffs appears to be of the sort that could not be redressed by judicial review of any final FTC order pursuant to 15 U.S.C. § 45(c) and (d).

II. FTC JURISDICTION

[5] As a general rule, the agency should make the initial determination of its own jurisdiction. *FPC v. Louisiana*

2. Plaintiffs claim as conservators of both FTC funds and funds of the state of California. Obviously, Congress has empowered the FTC to decide which actions are worthy of its attention. It is unclear whether the defense costs in this proceeding will be borne by the general funds of California or by the milk producers through a special tax designed to budget the Milk Advisory Board. For purposes of this appeal the distinction is irrelevant.

Power & Light Co., 406 U.S. 621, 647, 92 S.Ct. 1827, 32 L.Ed.2d 369 (1972). The plaintiffs rely upon an earlier case holding that exhaustion is not required when the challenge to the proceedings is that the agency was acting outside of its statutory authority. *Leedom v. Kyne*, 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed.2d 210 (1958). In *Leedom*, the Supreme Court permitted review of a National Labor Relations Board certification order where the action of the NLRB was in clear defiance of the express provisions of 29 U.S.C. § 159(b)(1). *See also Allen v. Grand Central Aircraft Co.*, 347 U.S. 535, 74 S.Ct. 745, 98 L.Ed. 933 (1954), and *Skinner & Eddy Corp. v. United States*, 249 U.S. 557, 39 S.Ct. 375, 63 L.Ed. 772 (1919), for the proposition that exhaustion of administrative remedies is not required when the challenge is to the agency's authority to act.

There is no need to reconcile these earlier decisions with equally venerable Supreme Court pronouncements such as *Myers v. Bethlehem Shipbuilding Corp., supra*, because more recent cases have limited their application to jurisdictional defects which are apparent on the face of the record. See *FPC v. Louisiana Power and Light Co., supra; Boire v. Greyhound Corp.*, 376 U.S. 473, 480, 84 S.Ct. 894, 11 L.Ed. 2d 849 (1964); *American Geenral Insurance Co. v. FTC*, 496 F.2d 197 (5th Cir. 1974); *Coca Cola Co. v. FTC*, 475 F.2d 299 (5th Cir.), *cert. denied*, 414 U.S. 877, 94 S.Ct. 121, 38 L.Ed.2d 122 (1973).

[6] While we express no opinion on the merits of the jurisdictional question, we note that the question is a close one. There is not, certainly, the kind of clear jurisdictional defect present here that was found in *Leedom v. Kyne* and its progeny. In the case before us, the FTC should have the opportunity to make the initial determination of its own jurisdiction.

We agree with *FTC v. Markin*, 532 F.2d 541 (6th Cir. 1976), and *FTC v. Feldman*, 532 F.2d 1092 (7th Cir. 1976),

both of which found that a *Parker v. Brown* challenge to FTC proceedings was premature pending final agency action.

[7] Primary jurisdiction in the agency makes sense in terms of both judicial economy and agency efficiency. If no cease-and-desist order is entered, the courts need never concern themselves with the jurisdictional issue. The same is true if the proceeding becomes moot because of voluntary conduct or the passage of time. Also of importance is the "avoidance of premature interruption of the administrative process." *McKart v. United States*, 395 U.S. at 193, 89 S.Ct. at 1662. Such interruptions undermine both the efficiency and the autonomy of the agency. They are justified only when it appears early and plainly that the agency is operating outside the scope of its authority.

III. INVOLVEMENT OF AGENCY EXPERTISE ON THE QUESTION OF JURISDICTION

[8] The question of the transferability of the *Parker v. Brown* antitrust immunity to deceptive advertising proceedings is strictly one of statutory interpretation. However, the requirement of exhaustion of remedies often applies as well to questions of law as to questions of fact. Courts should accord deference to an agency's own construction of its authorizing statute when reviewing final agency action. *Udall v. Tallman*, 380 U.S. 1, 85 S.Ct. 792, 13 L.Ed. 2d 616 (1965); *American General Insurance Co. v. FTC, supra. See also Pepsico, Inc. v. FTC*, 472 F.2d 179 (2 Cir. 1972). *Contra, Jewel Companies, Inc. v. FTC*, 432 F.2d 1155 (7th Cir. 1970).

Here, the plaintiffs allege not only that *Parker v. Brown* immunity applies to FTC advertising proceedings but also that these plaintiffs automatically qualify for the immunity *Parker v. Brown* confers.

[9] As was demonstrated by the Supreme Court in *Cantor v. Detroit Edison Co.*, ... U.S. ....., 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976), and *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975), a full factual development is an essential prerequisite for de termining the *Parker v. Brown* issue. This need for a solid factual record, again, is a strong argument favoring adherence to the doctrine of exhaustion of administrative remedies. *McGee v. United States*, 402 U.S. 479, 91 S.Ct. 1565, 29 L.Ed.2d 47 (1971).

CONCLUSION

[10] Upon a review of the three factors set forth in *Lone Star Cement Co. v. FTC, supra*, we hold that the plaintiffs here have not shown that judicial interference is necessary. Therefore, the injunction entered by the district court against the FTC is vacated, and the cause is remanded with neither party to have costs in this court.

Vacated and remanded.

Appendix 2

15 U.S.C. § 45. Unfair methods of competition unlawful; prevention by Commission—Declaration of unlawfulness; power to prohibit unfair practices

(a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

(2) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

(3) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which in substance provides that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby.

(4) Neither the making of contracts or agreements as described in paragraph (2) of this subsection, nor the exercise or enforcement of any right or right of action as described in paragraph (3) of this subsection shall constitute an unlawful burden or restraint upon, or interference with, commerce.

(5) Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.

(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended, except as provided in section 406(b) of said Act, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

Proceeding by Commission; modifying and setting aside orders

(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall

issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by sections 41 to 46 and 47 to 58 of this title, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such

time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however,* That the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.

Review of order; rehearing

(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission, and thereupon the Commission shall file in the court the record in the proceeding, as provided in section 2112 of Title 28. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are neces-

sary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were resonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting asside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 347 of Title 28.

Jurisdiction of court

(d) Upon the filing of the record with it the jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive.

Precedence of proceedings; exemption from liability

(e) Such proceedings in the court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the Commission or

judgment of court to enforce the same shall in anywise relieve or absolve any person, partnership, or corporation from any liability under the Antitrust Acts.

Service of complaints, orders and other processes; return

(f) Complaints, orders, and other processes of the Commission under this section may be served by anyone duly authorized by the Commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the residence or the principal office or place of business of such person, partnership, or corporation; or (c) by mailing a copy thereof by registered mail or by certified mail addressed to such person, partnership, or corporation at his or its residence or principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post office receipt for said complaint, order, or other process mailed by registered mail or by certified mail as aforesaid shall be proof of the service of the same.

Finality of order

(g) An order of the Commission to cease and desist shall become final—

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the Commission may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b); or

(2) Upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed, or the petition for review

dismissed by the court of appeals, and no petition for certiorari has been duly filed; or

(3) Upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review dismissed by the court of appeals; or

(4) Upon the expiration of thirty days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the Commission be affirmed or the petition for review dismissed.

Same; order modified or set aside by Supreme Court

(h) If the Supreme Court directs that the order of the Commission be modified or set aside, the order of the Commission rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected to accord with the mandate, in which event the order of the Commission shall become final when so corrected.

Same; order modified or set aside by Court of Appeals

(i) If the order of the Commission is modified or set aside by the court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered in accordance with the mandate of the court of appeals shall become final on the expiration of thirty days from the time such order of the Commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so

that it will accord with the mandate, in which event the order of the Commission shall become final when so corrected.

Same; rehearing upon order or remand

(j) If the Supreme Court orders a rehearing; or if the case is remanded by the court of appeals to the Commission for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered upon such rehearing shall become final in the same manner as though no prior order of the Commission had been rendered.

Definition of mandate

(k) As used in this section the term "mandate", in case a mandate has been recalled prior to the expiration of thirty days from the date of issuance thereof, means the final mandate.

Penalty for violation of order

(l) Any person, partnership, or corporation who violates an order of the Commission to cease and desist after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the Commission each day of continuance of such failure or neglect shall be deemed a separate offense.

Appendix 3

15 U.S.C. § 53. Same; temporary injunction—Power of Commission; jurisdiction of courts

(a) Whenever the Commission has reason to believe—

(1) that any person, partnership, or corporation is engaged in, or is about to engage in, the dissemination or the causing of the dissemination of any advertisement in violation of section 52 of this title, and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission under section 45 of this title, and until such complaint is dismissed by the Commission or set aside by the court on review, or the order of the Commission to cease and desist made thereon has become final within the meaning of section 45 of this title, would be to the interest of the public,

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States court of any Territory, to enjoin the dissemination or the causing of the dissemination of such advertisement. Upon proper showing a temporary injunction or restraining order shall be granted without bond. Any such suit shall be brought in the district in which such person, partnership, or corporation resides or transacts business.

Exception of periodical publications

(b) Whenever it appears to the satisfaction of the court in the case of a newspaper, magazine, periodical, or other publication, published at regular intervals—

(1) that restraining the dissemination of a false advertisement in any particular issue of such publication would delay the delivery of such issue after the regular time therefor, and

(2) that such delay would be due to the method by which the manufacture and distribution of such publication is customarily conducted by the publisher in accordance with sound business practice, and not to any method or device adopted for the evasion of this section or to prevent or delay the issuance of an injunction or restraining order with respect to such false advertisement or any other advertisement,

the court shall exclude such issue from the operation of the restraining order or injunction.

Appendix 4

FILED — JUL 7 1975

CLERK

In the United States District Court
for the Northern District of California

C-74-1927 (RHS)

State of California, *ex rel.*
C. B. Christensen, Director of Food and Agriculture, et al.,
Plaintiffs,

vs.

Federal Trade Commission, et al.,
Defendants.

FINAL JUDGMENT AND ORDER

This matter came on for hearing before the Court on May 9, 1975, upon defendant's motions for dismissal or, alternatively, for summary judgment and plaintiffs' cross motion for summary judgment. The Court has considered the several motions, the briefs and affidavits of the parties, the arguments of counsel and the Court's written findings of fact and conclusions of law filed October 29, 1974, in support of the preliminary injunction entered herein on September 23, 1974. Based upon the foregoing record, the Court has determined that there is no genuine issue as to any material fact and that plaintiffs are entitled to judgment as a matter of law.

IT IS THEREFORE ORDERED, DECLARED AND ADJUDGED:

1. That defendants' motions to dismiss and for summary judgment herein are denied.

2. That plaintiffs' motion for summary judgment herein is granted.

3. That the Federal Trade Commission has no jurisdiction to proceed against plaintiffs under the Federal Trade Commission Act with respect to the matters complained of in the Federal Trade Commission proceeding designated as Docket No. 8988.

4. That the preliminary injunction, previously granted and issued by this Court on September 23, 1974, be, and hereby is, made permanent, and the defendants, their successors, agents, and employees, and all other persons in active concert and participation with them are hereby permanently enjoined and restrained from proceeding further against plaintiffs in Docket No. 8988, presently pending before the Federal Trade Commission.

5. That no costs shall be assessed against defendants. Dated at San Francisco, California this 7th day of July, 1975.

Clerk of the U.S. District Court
Northern District of California

APPROVED:

/s/ ROBERT H. SCHNACKE
Robert H. Schnacke
United States District Judge

In the United States District Court for the
Northern District of California

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FILED — JUN 25 1975

CLERK

C-74-1927 RHS

State of California, *ex rel.*
C. B. Christensen, Director of Food and Agriculture, et al.,
Plaintiffs,

vs.

Federal Trade Commission, et al.,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. This action is brought by the State of California on behalf of its Director of Food and Agriculture (a civil executive officer of the State); the California Milk Producers Advisory Board (established pursuant to the California Marketing Act of 1937 [Cal. Food & Ag. Code §§ 58601-59293] to assist the Director of Food and Agriculture in the administration of a marketing order, issued on October 8, 1969, for research, education, and promotion of market milk and dairy products in California); and Cunningham and Walsh, Inc. (an advertising agency which in all matters here involved, has acted as the agent of the State). The defendant Federal Trade Commission (hereinafter, FTC) is an independent agency of the United States Government, and the individual defendants in this action

are the current members of the FTC and an administrative law judge thereof, who are sued solely in their official capacities.

2. On August 1, 1974, an administrative complaint was issued by the FTC, Docket No. 8988, naming as respondents the California Milk Producers Advisory Board and Cunningham and Walsh, Inc. In the FTC complaint certain advertisements promoting the sale of milk were alleged by the FTC to be false and misleading in violation of Sections 5 and 12 of the Federal Trade Commission Act (hereinafter, FTC Act). Plaintiffs here seek a permanent injunction and a declaratory judgment against the FTC's proceeding with its administrative complaint in Docket No. 8988, on the grounds that Congress has not granted the FTC jurisdiction over states, state agencies, state instrumentalities, or state officers acting in their official capacities.

3. On September 11, 1974, this Court granted a temporary restraining order enjoining the FTC from proceeding for a period of 10 days. A preliminary injunction was granted on September 23, 1974. Findings of fact and conclusions of law were filed on October 29, 1974.

4. Defendants have filed a motion to dismiss herein and, in the alternative, a motion for summary judgment. Plaintiffs have filed a cross-motion for summary judgment. Both plaintiffs and defendants have filed lengthy affidavits and exhibits in connection with these motions which supplement the affidavits and exhibits filed in connection with the hearing on the preliminary injunction granted herein. Based on the affidavits and exhibits filed herein and the provisions of the California Marketing Act of 1937 [Cal. Food & Ag. Code §§ 58601-59293], the Court finds the facts set forth below are established and undisputed in this record.

5. The California Milk Producers Advisory Board is an instrumentality of the State of California established to

assist and advise the Director of Food and Agriculture in fulfilling his statutory duties under the California Marketing Act of 1937. The Director of Food and Agriculture and the State of California are the real parties in interest herein. The advertising being challenged by the FTC in Docket No. 8988 is part of the marketing order of October 8, 1969, effectuated by the Director of Food and Agriculture, pursuant to the California Marketing Act of 1937, which specifically authorizes such advertising.

6. No facts have been adduced in this record to contradict the affidavit of Gordon B. Reuhl, dated March 13, 1975, which provides:

> "(5) With respect to the promotional activities of the Advisory Board, all budgets, programs, and specific advertising copy are recommended by the Board, to the Director of Food and Agriculture for his specific approval prior to their implementation. From time to time the Director has specifically disapproved certain promotional materials recommended by the Board. In such cases, the proposed program or materials have not been used. In addition to requiring the approval of the Director of Food and Agriculture on all programs and materials, the Board has, since 1972, submitted all nutritional material to Dr. George Briggs of the University of California for his approval prior to the use of such material.
>
> (6) In my capacity as Manager of the Board, I am required to submit all recommendations by the Board to the Director of Food and Agriculture of the State for his approval, and this procedure has been followed."

7. Cunningham and Walsh, Inc., at all times relevant herein, to the extent that it has participated in the creation, preparation, or dissemination of the advertising materials challenged by the FTC, has acted as the agent of the State.

8. The Court finds that there are no material issues of fact between the parties herein and that the aggregate effect of the delay, expense, and uncertainty which would result from resort to the administrative process herein would result in irreparable injury to plaintiffs herein, for which they would have no adequate remedy at law. The importance of the question presented relating to state-federal relations indicates that prompt judicial resolution of this jurisdictional dispute by the courts at this time is required.

CONCLUSIONS OF LAW

1. The jurisdiction of the FTC under the FTC Act extends to "persons, partnerships, or corporations" [15 U.S.C. § 45(a)(6)]. The definition of corporation includes an "association, incorporated or unincorporated . . . which is organized to carry on business for its own profit or that of its members" [15 U.S.C. § 44]. Neither the FTC Act nor its legislative history indicates that states, state agencies, state instrumentalities, or state officers in their official capacities were intended by Congress to be included within the terms "persons, partnerships, or corporations."

2. The FTC Act was designed to supplement and bolster the Sherman Act, to stop in their incipiency acts and practices which, when full blown, would violate the Sherman Act [*FTC v. Motion Picture Adv. Co.*, 344 U.S. 392, 394-395 (1953)]. In view of the close relationship between the two Acts, the fact that action by states, state agencies, state instrumentalities, and state officers in their official capacities is not subject to the Sherman Act [*Parker v. Brown*, 317 U.S. 341 (1943); *New Mexico v. American Petrofina, Inc.*, 501 F.2d 363 (9th Cir. 1974)] indicates that it is not subject to the FTC Act either.

3. The FTC may not proceed against a private corporation—here, Cunningham and Walsh, Inc.—merely aiding

the State in carrying out the conduct in question [*E.W. Wiggins Airways, Inc. v. Massachusetts Port Auth.*, 362 F.2d 52, 56 (1st Cir. 1966)].

4. Ordinarily, courts won't interfere with an administrative agency until it has completed its action, and administrative remedies may not be bypassed [*Borden, Inc. v. FTC*, 495 F.2d 785, 786-787 (7th Cir. 1974)]. However, the FTC here clearly lacks jurisdiction under the FTC Act over the State and the other plaintiffs, and there is no specialized administrative understanding required to determine that this is so, such as would be required to decide, for example, the factual question of whether a private entity was engaged in interstate commerce; this case involves only a question of statutory construction. For the foregoing reasons, requiring exhaustion of administrative remedies is inappropriate [see *Lone Star Cement Corporation v. FTC*, 339 F.2d 505, 510 (9th Cir. 1964); *Leedom v. Kyne*, 358 U.S. 184, 188-189 (1958)].

5. There are no material disputed issues of fact. Defendants' motions to dismiss and for summary judgment herein are denied. Plaintiffs' motion for summary judgment is hereby granted. Plaintiffs are entitled to a permanent injunction prohibiting defendants, their agents and employees, from proceeding further against plaintiffs in Docket No. 8988, presently pending before the FTC. Plaintiffs are further entitled to a declaratory judgment that the FTC has no jurisdiction to proceed against them under the FTC Act with respect to the matters complained of by the FTC in Docket No. 8988. Judgment shall be entered accordingly. Costs shall not be assessed against defendants herein.

Dated: June 24, 1975

/s/ ROBERT H. SCHNACKE
Robert H. Schnacke
United States District Judge